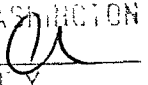


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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

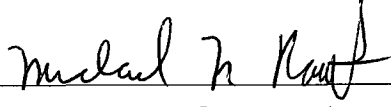
NO. 42255-7-II

STATE OF WASHINGTON
APPELLANT

VS.

R.M-S
RESPONDENT

BRIEF OF APPELLANT


MICHAEL N. ROTHMAN
SR. DEPUTY PROSECUTOR
WSBA #33048

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A.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in dismissing this case pursuant to CrR 8.3(b) by not finding that the juvenile respondent had effectively waived his right to a timely capacity hearing under JuCR 7.6(e).
2. The trial court abused its discretion in dismissing this case pursuant to CrR 8.3(b) by finding that the State mismanaged this case and that such action prejudiced the juvenile respondent's right to a fair trial.
3. The trial court abused its discretion in dismissing this case pursuant to CrR 8.3(b) by not considering other alternatives that would have been less draconian than dismissal.

B.

ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENTS OF ERROR

1. Does the doctrine of waiver prevent a juvenile respondent from challenging the timeliness of a capacity hearing under JuCR 7.6(e), when a respondent has notice of the date of a capacity hearing but does not object to the timeliness of the capacity hearing until the actual date of the hearing? (Assignment of Error No. 1).
2. Did the State's failure to object to the date set by the court for a capacity hearing (which was beyond the 14-day limit listed in JuCR 7.6(e)) constitute prosecutorial mismanagement/ governmental misconduct? (Assignment of Error No. 2).
3. Did the failure to conduct a capacity hearing within the 14-day period listed in JuCR 7.6(e)

prejudice the juvenile respondent's right to a fair trial? (Assignment of Error No. 2).

4. Was dismissal of this case the appropriate remedy for not holding a timely capacity hearing under JuCR 7.6(e), given that dismissal of criminal charges is an extraordinary remedy that should be used only as a last resort? (Assignment of Error No. 3).

C.

STATEMENT OF THE CASE

On April 7, 2011, the State filed an Information charging R.M-S. with one count of Contempt of Court. CP 2. On April 15, 2011, R.M-S. appeared for court and arraignment was set for May 3, 2011. CP 6. On May 3, 2011, R.M-S. was arraigned; the trial date and capacity hearing were set for June 9, 2011. RP May 3, 2011, CP 5. A capacity hearing was necessary because the respondent was

eleven years of age. RP April 15, 2011 at 4. Counsel for the respondent did not object to the setting of the capacity hearing on the same date as trial. RP May 3, 2011. Before the capacity hearing began on June 9, 2011, counsel for the respondent made an oral motion to dismiss the charge due to the failure of the State to hold a capacity hearing within 14 days from R.M-S.'s first court appearance. RP June 9, 2011 at 2-19. The State responded that in order for R.M-S. to prevail on this motion to dismiss, there must be a showing of prejudice to the respondent's right to a fair trial. RP June 9, 2011 at 2-19. The court initially found that R.M-S.'s right to a fair trial was not violated and denied R.M-S's motion. RP June 9, 2011 at 19-22. Counsel for the respondent requested that the court find that defense counsel could not

adequately prepare for trial until a capacity determination was rendered. RP June 9, 2011 at 22.

At this point counsel for the respondent made an oral motion pursuant to CrR 8.3(b) to dismiss. RP June 9, 2011 at 22-25. This oral motion did not address the issue of whether the respondent's right to a fair trial had been prejudiced by the delay of the capacity hearing. The State objected to hearing the motion due to lack of a written motion. The State pointed out that in order to dismiss a criminal case pursuant to 8.3(b) the respondent was required to show that his right to a fair trial had been prejudiced. RP June 9, 2011 at 25. Counsel for the respondent then went on to indicate it was the State's fault that the trial would have to be continued and that he did not have time to prepare for a trial within the time for speedy trial. RP June 9, 2011 at 27-

29. The State responded that it was prepared to proceed to trial and that it was not responsible for defense counsel's schedule. RP June 9, 2011 at 29–30.

The court accepted the argument by the respondent's counsel that the respondent was not ready to proceed to trial, because it was unclear how the court would rule on the issue of capacity. RP June 9, 2011 at 30. At this juncture, the State pointed out that the determination of capacity did not affect the facts that would be presented at trial. RP June 9, 2011 at 30–31. The court then asked counsel for respondent to respond to the State's argument that a dispositive motion needed to be in writing and that there needed to be significant time for the State to respond to the motion. RP June 9, 2011 at 31. The respondent's defense counsel indicated that he could make whatever motion he

wanted, because the State failed to follow the court rules and that a special setting for the trial was inconvenient for the respondent. RP June 9, 2011 at 31–32.

The court then dismissed the case with prejudice pursuant to CrR 8.3(b). CP 4. No written findings of fact were entered into the record. The State filed a timely appeal.

D.

ARGUMENT

1. Standard of Review.

When a trial court grants a motion to dismiss under CrR 8.3(b), the relevant standard of review is abuse of discretion. State v. Blackwell, 120 Wash. 2d 822, 830, 845 P.2d 1017 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its

decision on untenable grounds, or when it makes its decision for untenable reasons. Id.

2. The respondent waived his right to challenge the timeliness of the scheduled capacity hearing, because he did not object timely to the date of the capacity hearing which was set by the court.

Under JuCR 7.6(e), a capacity hearing needs to be held within 14 days of the juvenile's first court appearance. For whatever reason, the court did not set the capacity within the required 14-day period. Neither the State nor the respondent objected to the date of the capacity hearing when it was set on May 3, 2011. No objection was made to this date until the respondent's lawyer orally objected on the date the capacity hearing was supposed to take place (June 9, 2011). In a situation such as this, the court does not lose jurisdiction. State v. B.P.M., 97 Wash. App. 294, 296, 982

P.2d 1208 (1999). Furthermore, the court has authority to extend the time for holding a capacity hearing. Id. at 300.

The respondent argued that as a matter of law this case had to be dismissed because of the 14-day stricture contained in JuCr 7.6(e). It is important to emphasize again that the respondent's attorney did not make a motion challenging the date of the capacity hearing until the actual day of the scheduled capacity hearing. Nothing prevented the respondent from making this motion earlier. Hence, the State asserts that the doctrine of waiver applies and the respondent's motion should have been denied.

The situation here is analogous to the waiver of the right to a speedy trial. In the context of the speedy trial rule, a defendant's failure to object timely constitutes waiver. Cf. State v. Anderson, 102 Wash. App. 405, 9 P.3d 840 (2000).

Just like the speedy trial right, a respondent should not be allowed “to lie in weeds” and then object at the last minute that the capacity hearing is untimely in the hope of obtaining an outright dismissal of his case.

In granting the respondent’s motion to dismiss with prejudice, the court abused its discretion in not analyzing the doctrine of waiver and in not holding that the respondent had waived his right to challenge the timeliness of the capacity hearing. The court’s decision, therefore, should be reversed and the matter should be remanded for a capacity hearing.

3. The State’s conduct in this case does not rise to the level of prosecutorial mismanagement/governmental misconduct.

CrR 8.3(b) reads as follows:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

In this case the trial court found that the State engaged in arbitrary action or governmental misconduct. Specifically, the court said that the Prosecutor's Office committed mismanagement. RP June 9, 2011 at 27. The trial court cited State v. Garza, 99 Wash. App. 291, 295, 994 P.2d 868 (2000) for the proposition that simple mismanagement is enough. Id. See also State v. Dailey, 93 Wash. App. 454, 457, 610 P.2d 357 (1980).

What is curious here is that the purported mismanagement stems primarily from the action of the

court. It was the court – – not the Prosecutor’s Office – – who set the date for the capacity hearing beyond the 14-day time limit required by JuCR 7.6(e). Nevertheless, the oral decision of the court places blame exclusively on the Prosecutor’s Office. Although the State admits that it should have brought the 14-day time limit in JuCR 7.6(e) to the attention of the court, this oversight does not absolve the court of its own duty to follow this court rule. Moreover, it is the court’s responsibility to set hearing dates. Hence, the State asserts that the trial court abused its discretion in labeling the prosecutor’s failure to apprise the court of the relevant court rule as mismanagement.

4. The failure to conduct a capacity hearing within the 14-day period listed in Ju CR 7.6(e) did not prejudice the juvenile respondent’s right to a fair trial.

In addition to arbitrary action/ governmental mismanagement prong of CrR 8.3(b), this court rule also requires prejudice to the respondent in order for a case to be dismissed. Specifically, CrR 8.3(b) requires “prejudice” to the rights of the accused which materially affect the accused’s right to a fair trial. The respondent must show by a preponderance of the evidence that the action in question prejudiced his right to a fair trial. State v. Rohrich, 149 Wash. 2d 647, 654, 71 P.3d 638 (2003) (citing State v. Michielli, 132 Wash. 2d 229, 240, 937 P.2d 587 (1997)),

At the outset, it must be noted that failure to comply strictly with the requirement of JuCr 7.6(e) does not dictate an outright dismissal of the charge. State v. B.P.M., 97 Wash. App. at 299. The trial court has discretion to fashion an appropriate remedy. Id. at 300–301. In this instance,

however, the trial court was not presented with evidence which demonstrated that the need to conduct a capacity hearing would materially affect the respondent's ability to receive a fair trial. The respondent's attorney complained that the delay in scheduling the capacity hearing was prejudicial, because it compromised his ability to represent his client. RP June 9, 2011 at 27-29.

But as pointed out by the State, respondent's counsel failed to provide any evidence or even assert how having the capacity hearing on the same day as the trial would affect his ability to prepare for trial. RP June 9, 2011 at 30-31. The trial court failed to inquire as to why counsel for the respondent would not be able to prepare a defense until the capacity hearing was held. The State informed the court that the determination of capacity would not affect the evidence

admissible at trial. Further, the capacity hearing would not have adduced any additional evidence not known to respondent's counsel that would have been admissible at trial.

In short, the need to conduct a capacity hearing in no way affected the ability of the respondent's attorney to prepare for the trial. Since the purpose of the capacity hearing is qualitatively different from the focus of a trial, nothing prevented respondent's counsel from preparing simultaneously for the capacity hearing and the trial. Under CR 8.3(b), "the requirement for a showing of prejudice . . . is not satisfied merely by expense, inconvenience, or additional delay within the speedy trial period; the misconduct must interfere with the defendant's ability to present his case."

City of Kent v. Sandler, 159 Wash. App. 836, 841, 247 P.3d 454 (2011).

Since the need for a capacity hearing has no bearing on how the respondent's attorney would prepare for the trial, prejudice does not exist. Consequently, the decision of the trial court to dismiss this case is untenable and constitutes an abuse of discretion.

5. The trial court abused its discretion in dismissing this case pursuant to CrR 8.3(b) by not considering other alternatives that would have been less draconian than dismissal.

Dismissal of a criminal charge is an extraordinary remedy that should be applied only as a last resort. State v. Wilson, 149 Wash. 2d 1, 12, 65 P.3d 657 (2003). A trial court abuses its discretion by not considering intermediate remedial steps that are less extreme than dismissal. Id. See

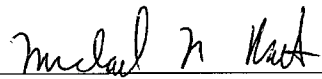
also State v. Koerber, 86 Wash. App. 1, 4, 931 P.2d, 904 (1996). At one point in the proceedings on June 9, 2011, the trial court stated that it would continue the matter for cause. RP, June 9, 2011 at 22. Ultimately, the trial court changed its mind and dismissed this case, but the trial court never indicated why a continuance would not have sufficed as a less extreme alternative. It is also unclear why the trial court felt that it was inappropriate to have a capacity hearing and a trial on the same day, when the court previously had approved the scheduling of the capacity hearing and the trial on the same day. Id., CP 5. Thus, the trial court abused its discretion by not reconsidering the possibility of granting a continuance to assuage the concerns of the respondent.

E.

CONCLUSION

For the reasons listed above, the trial court abused its discretion in dismissing this case. The order of the Superior Court dismissing this case should be vacated. This matter should be remanded to the Superior Court so that this case can begin anew with a capacity hearing.¹

RESPECTFULLY SUBMITTED:



MICHAEL N. ROTHMAN
SENIOR DEPUTY PROSECUTOR
WSBA# 33048

¹ The State does not believe that this matter should be remanded to the Superior Court for the entry of explicit written findings of fact. Although CrR 8.3(b) states that “[t]he court shall set forth its reasons [for the dismissal of the criminal charge] in a written order,” the State asserts that the record is sufficiently clear for the Court of Appeals to make a substantive ruling. From the State’s perspective, remanding the case for written findings of fact would unnecessarily delay the disposition of this matter.

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	NO 42255-7-II
Appellant)	
)	AFFIDAVIT OF MAILING
R.M-S,)	
)	
Respondent)	
_____)	

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

VICKI FLEMETIS, being first duly sworn on oath, deposes and says:


I am the Office Administrator for the Prosecuting Attorney's Office for Pacific County, Washington.

That on 9/30/2011, I mailed 2 copies of Appellant's Brief to:

ERIC J. NIELSEN
ATTORNEY AT LAW
1908 E. MADISON STREET
SEATTLE, WA 98122-2842


VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 30th day of
September, 2011.


NOTARY PUBLIC in and for the State
of Washington, residing at:
RAYMOND